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DIVISION II

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STATE OF WASHINGTON

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No. 45407-6-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

RONALD CLIPSE

Appellant.

v.

COMMERCIAL DRIVER SERVICES, INC. AND LEE BRUNK

Respondents.

**AMENDED REPLY BRIEF OF CROSS-APPELLANTS
PER COURT ORDER OF DECEMBER 8, 2014**

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I. INTRODUCTION

Appeal is sought because dismissal of Ronald Clipse's (hereinafter "Clipse") claims of discrimination upon the authority of CR 50 and/or CR 56 should have been granted on Cross-Appellant Lee Brunk's and Commercial Driver Services Inc.'s motions. (hereinafter referred to cumulatively as "CDS" and "Brunk"). The motions should have been granted because there was no legally sufficient evidentiary basis for Clipse's claims or for a reasonable jury to find in favor of Clipse on his claim of promissory estoppel or claims of discrimination predicated on perceived disability or accommodation of his perceived disability. CR 50; CR 56. This is due to the fact that no evidence was offered establishing a disability which Clipse could be perceived to have.

II. ARGUMENT

A. Clipse Failed to Establish that Recovered Drug Addiction is a Disability as Required by RCW 49.60.040(7).

1. RCW 49.60.040(7) Requires that the Disability or Perceived Disability be Shown to be a Sensory, Mental or Physical Impairment.

Clipse failed to establish that recovered drug addiction meets the definition of disability as set forth in RCW 49.60.040(7). RCW 49.60.040(7)(a) provides:

“Disability” means the presence of a sensory, mental, or physical impairment that:

- (i) Is medically cognizable or diagnosable; or
- (ii) Exists as a record or history; or
- (iii) Is perceived to exist whether or not it exists in fact.

This definition requires proof that the health condition meets the definition of disability; then the plaintiff may allege they actually suffer from the disability, that there is a record of the disability, or that they are perceived to have the disability, though they do not. Here, Clipse did not establish that recovered drug addiction is a sensory, mental or physical impairment. RCW 49.60.040(7). Clipse argues that the presence of “or” in the definition permits a litigant to meet the definition of disability even if they satisfy only 49.60.040(7)(iii). This mischaracterizes the structure of the definition. The “or” component only applies to subsections (i), (ii), (iii) *after* the first element establishing, “the presence of a sensory, mental or physical impairment,” is met. RCW 49.60.040(7). Consequently, the threshold inquiry is always whether the complained of condition is an impairment, next the court then determines whether the impairment is diagnosable, is a record, or is perceived to exist. Any one of these three methods may satisfy the second part of the definition, but only after the condition is shown to be an impairment. RCW 49.60.040(7).

Washington courts have held that while Washington is free to adopt rationale and theory which serve the State's statute, federal employment law rulings can represent a "source of guidance." Hill v. BCTI Income Fund, 144 Wn.2d 172, 180, 23 P.3d 440 (2001). In this case, Clipse has argued that perception of disability can be a substitute for actual disability, whether the perceived condition is a disability or not. This presents a circular analysis for the Court and is unworkable. In the case of Walton v. U.S. Marshals Service, 492 F.3d 998, (9th Cir. 2007), the litigant attempted to prove his case based, in part, on the negative perceptions of the employer. Walton, 492 F.3d at 1006. The Ninth Circuit dismissed the plaintiff's claim on summary judgment noting that, "If the plaintiff does not have direct evidence of the employer's subjective belief that the plaintiff is substantially limited in a major life activity, the plaintiff must further provide evidence that the impairment imputed to the plaintiff is, objectively, a substantially limiting impairment." Id. Though the definition of disability is different under federal law, the principal at issue in this case is the same. The condition the employer perceives the employee to have must actually be an impairment. Here, Brunk's alleged comments that Clipse should "clean up" are not direct evidence that Brunk perceived Clipse to have an impairment. It is also unclear what *objective*

impairment Clipse is regarded to have. The evidence of recovered drug addiction is far more nebulous than the evidence offered in Walton (hearing difficulties) and Brady (alcoholism) where the existence of a health condition qualifying as a disability was considered and rejected. Walton, 492 F.3d at 1008, Brady v. Daily World, 105 Wn.2d 138, 145, 94 P.3d 930 (2004).

2. Animus Is Not Sufficient to Articulate a Claim Where, as Here, the Condition Toward Which the Alleged Animus is Directed Is Not Shown to Be a Disability.

Clipse again argues that a plaintiff need not establish that a perceived health condition qualifies as a disability where the employer possessed animus toward the perceived condition, regardless of whether the condition is a disability as defined by RCW 49.60.040(7). First, at best, what Brunk demonstrated was animus toward narcotic use, a no doubt appropriate animus for the operator of a commercial driving school. There is no evidence equating animus toward narcotic use, which is the subject of extensive regulation among commercial drivers, with animus toward the alleged disability of recovered drug addiction. (Trial Ex. 14A).

There is similarly no support for the argument that Washington law provides a remedy for all behavior engaged in by a perspective employer. Washington courts have repeatedly held that “the courts are ill-equipped to

act as super personnel agencies.” White v. State, 131 Wn.2d 1, 19-20, 929 P.2d 396 (1997) (quoting White v. State, 78 Wn. App. 824, 840, 898 P.2d 331 (1995) (citing Washington Federation of State Employees v. State Personnel Bd., 29 Wn. App. 818, 820, 630 P.2d 951 (1981))). Clipse’s claim is an effort to induce the Court to act as a super personnel agency under the specter of an allegation of disability discrimination. Animus, even if possessed by Brunk, is plainly not actionable as disability discrimination unless it falls within the ambit of the WLAD.

Clipse also attempts to bolster his argument that Brunk had an animus against methadone use by mischaracterizing the record. Those portions relied upon by Clipse reflect Brunk’s oft repeated view that methadone use was inconsistent with the duties of a commercial truck driver, which Brunk based on his research into the Code of Federal Regulations applicable to commercial truck drivers. (RP August 20, 2013, Vol. I p. 31:3-17). Regardless, Brunk’s and CDS’s view of methadone use is irrelevant where Clipse has failed to show that recovered drug addiction is a disability, which he must do before he can establish that he was perceived to have such disability.

The clear language of RCW 49.60.040(7) limits the claims and remedies available in Ch. 49.60 RCW to individuals who have a disability

or are perceived to have a disability. The condition which a party is perceived to have must meet the definition of disability for a litigant to be entitled to relief under Ch. 49.60 RCW. RCW49.60.040(7); Brady, 105 Wn.2d at 145.

In this case, no witness testified that recovered drug addiction is a medical, cognizable or diagnosable impairment affecting one's sensory, mental or physical condition. Eclipse could not have offered such testimony as he states he is not, in fact, a recovered drug addict. (RP August 22, 2013 pp. 59:23-61:5). There is also an absence of testimony regarding recovered drug addiction from either Dr. McKendry or Dr. Pang. Brunk's alleged negative comments do not make up for this evidentiary gap. The fact that Brunk's view of narcotic use, namely methadone, is characterized as negative does not circumvent the need to establish these elements.

B. CDS Has Articulated the Correct Definition of Disability.

Throughout CDS's briefing, it relies upon RCW 49.60.040(7) and argues that prior case law still provides guidance as to the measure of proof required of the element of disability or perceived disability, despite the fact that the definition of disability has recently evolved. For example, Davis v. Microsoft Corp. outlines the four elements to establish a

disability discrimination claim. Davis, 109 Wn. App. 884, 889-90, 37 P.3d 333 (2002). Only the first element, that the employee had a sensory, mental or physical abnormality that substantially limited his or her ability to perform the job, was altered by the revised definition of RCW 49.60.040(7). Washington's line of cases in the area of disability are still good authority with respect to those aspects of the analysis unaffected by the changed definition of RCW 49.60.040(7). For example, in both Riehl v. Foodmaker and Brady v. Daily World, the court opined that the plaintiff must offer testimony that the complained of condition amounts to a disability. Riehl, 152 Wn.2d 138, 145, 94 P.3d 930 (2004); Brady, 105 Wn.2d at 789.

Though the definition of disability may have changed, the burden on the plaintiff to produce actual evidence that a particular condition meets the definition of disability (however that may be defined) has not been modified by the changes to RCW 49.60.040(7) or subsequent law.

C. Testimony Is Required Regarding Whether the Alleged Condition is a Disability.

Counsel argues that Washington law does not require medical testimony as to whether the health condition is a mental, sensory or physical impairment where the employer admits it. (Brief of Appellant at pg. 28). Though counsel mischaracterizes the law, this Court need not

determine whether medical testimony is required to establish a disability because there was no testimony that recovered drug addiction is a disability from either Clipse, Dr. McKendry or Dr. Pang. No authority is offered for the proposition that *no* testimony regarding the alleged disability is required.

D. Clipse Did Not Articulate a Claim for Disparate Treatment on the Basis of Disability.

Clipse now argues that he was subject to disparate treatment, though this is not in accord with Clipse's complaint or the case presented to the jury (as he concedes), regardless, Clipse cannot establish this claim. (CP 3-6). "The elements of a prima facie case of disparate treatment disability discrimination are that the employee was: [1] disabled, [2] subject to an adverse employment action, [3] doing satisfactory work, and [4] discharged under circumstances that raise a reasonable inference of unlawful discrimination." Brownfield v. City of Yakima, 178 Wn. App. 850, 316 P.3d 520 (2014) (quoting Callahan v. Walla Walla Hous. Auth., 126 Wn. App. 812, 819-20, 110 P.3d 782 (2005)). Again, there is no claim for disparate treatment where no evidence was offered that Clipse was disabled nor has he offered a comparator who was treated more favorably under circumstances raising an inference of discrimination. This claim is not remotely cognizable on the evidence offered in this case.

***E. Clipse Did Not Establish that CDS Failed to Accommodate Him
Where He Never Sought Accommodation and the
Accommodation Proposed at Trial is Acceptance of Narcotic Use
from a Commercial Truck Driver.***

There is no disability to accommodate in a case where the plaintiff is alleged to be perceived to have a disability but does not, in fact, suffer from a disability. Absent a qualifying disability, there is simply no impairment to accommodate. The failure of this threshold inquiry is only one of several problems with Clipse's accommodation claim.

A failure to accommodate claim requires a showing that 1) the employee is disabled, 2) the employee is qualified to fill the position, and 3) the employer failed to reasonably accommodate the employee's disability. Fischer-McReynolds v. Quasim, 101 Wn. App. 801, 808, 6 P.3d 30 (2000). "[A]n employer's duty to reasonably accommodate an employee's handicap does not arise until the employee gives notice of the disability." Fey v. State, 174 Wn. App. 435, 300 P.3d 435 (2013) (citing Goodman v. Boeing Co., 127 Wn.2d 401, 408, 899 P.2d 1265 (1995)). "A failure to engage in the interactive process does not form the basis of a disability discrimination claim in the absence of evidence that accommodation was possible." Fey, 174 Wn. App. at 445.

1. Clipse Did Not Establish that He Was Qualified.

Clipse never established that he was qualified due to his admission that he never provided CDS proof of his one year card. (RP August 21, 2013 p. 86:9-19; RP August 22, 2013 pp. 61:8-62:5). Clipse testified that when he met with Brunk he only had in his possession his thirty day card. (RP August 21, 2013 p. 84:11-16). There is also no dispute that Clipse was on methadone at the time. Id. Contrary to Clipse's argument, CDS did present ample evidence that it forbade narcotic use among its drivers. (Trial Ex. 12). Brunk also produced evidence of the FMCSA publications, which he testified were regularly relied upon by commercial truck drivers, and which he relied upon. (RP August 21, 2013 pp. 24-26; CP 857; Trial Ex 14A). CDS regarded the FMCSA's and their own policies as prohibiting methadone use. (RP August 21, 2013 pp. 24-26; CP 857; Trial Ex 14A). CDS was entitled to regard the absence of narcotic use and strict compliance with the FMCSA as a job requirement. Fey, 174 Wn.App. at 451-52. This court should not second guess the employer's determination of job functions. Id. Brunk unequivocally testified that CDS has never hired an employee to drive who was taking narcotics. (RP August 21, 2013 pp. 26:23-27:12). CDS should not be held liable for its failure to tolerate narcotic use in Clipse where CDS has never

previously tolerated narcotic use in its commercial drivers. Based on this evidence, Clipse, as a regular user of narcotics was not a qualified candidate for the job.

2. *Clipse Never Triggered the Accommodation Process.*

Though CDS was not required to engage in the interactive process in this case, Clipse never suggested or proposed an accommodation. The sole “accommodation” argued is for CDS to tolerate narcotic use. This is an accommodation claim veiled as a dispute as to CDS’s job requirements. An employer is simply not required to “revamp the essential functions of a job to fit the employee.” Fey, 174 Wn.App. 435. Further, no claim can be made that CDS’s opposition to narcotic use among its drivers is a legitimate requirement of its employees. Here, as in Fey dismissal is appropriate where the sole accommodation issue articulated is essentially a demand that the employer change its job requirements. Fey, 174 Wn.App. 435.

3. *Clipse Cannot Establish an Accommodation Claim by Characterizing the Side-Effects of Medication As a Disability.*

Clipse now argues that methadone is itself a disability by pointing to Dr. McKendry’s testimony that methadone can cause, “jitteriness, hyperthesia, fatigue/sleepiness, nausea, and lack of concentration.” (Brief

of Appellant at pg. 39). This argument merely illustrates Brunk's, CDS's and the FMCSA and DOT's, concerns with hiring a commercial driver taking narcotics. Further, no authority is offered for the proposition that an *accurate* negative perception of a side effect of a medication is actionable as discrimination. In such a scenario, one cannot say that the disability motivated the employment decision; rather, legitimate occupational requirements motivated the employer's concerns. Again, the touchstone is whether an impairment exists which then may give rise to the obligation of accommodation. Clipse now argues that he should be permitted to drive on methadone while highlighting evidence of the side effects of methadone, offered in his case-in-chief, which are themselves incompatible with driving a commercial motor vehicle.

Clipse also offers no authority for the proposition that the side effects of a medication are an impairment as defined by RCW 49.60.040(7)(a). A more complicated case could be presented if the side effects of a particular medication did not so clearly impact one's ability to drive, in this case such nuanced issues are not relevant where the recited side-effects are clearly at odds with finding Clipse qualified to drive a commercial motor vehicle.

F. Clipse’s Claim for Promissory Estoppel Requires Dismissal Where Clipse was an At-Will Employee.

There is no dispute that Clipse was considered for an at-will position. (RP August 20, 2013 pp. 11-12, 19:18-23; RP August 22, 2013 pp. 70:20-23, 71:1-2, 72:20-73:7). Clipse misconstrues Havens, which held that, “where the terminable at will doctrine is concerned, the promise for promissory estoppel must be a ‘clear and definite promise.’” Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 876 Wn.2d 435 (194). In Havens, the court found that an at-will position did not establish, as a matter of law, promises which would support a claim for promissory estoppel. Id. at 174. Specifically, there were no promises of termination only for just cause and no “clear and definite” promises of permanent employment. Id. Further, the court noted that statements such as, “they were looking forward to a long and prosperous future together” or statements referencing working until retirement were nothing more than the employer’s hopes and the plaintiff’s recitation of their own expectations. Id. Notably, the posture of Havens is similar to that in this case, in that the Supreme Court held that the trial court should have dismissed the claim pursuant to CR 50. Id. at 176.

In this case, there were no discussions even approaching the level of detail that were at issue in Havens. At best, nothing more than a

potential at-will position is at issue in this case, per Havens, a terminable at-will position is insufficient to establish a claim for promissory estoppel.

G. Washington Does Not Require Renewal of a CR 50 Motion After the Jury Returns Its Verdict.

Counsel argues that Brunk failed to preserve its assertion of error regarding denial of its motion pursuant to CR 50 because the motion was not renewed after the jury returned its verdict. This argument was explicitly rejected in Washburn v. City of Federal Way, 178 Wn.2d 732, 749-50, 310 P.3d 1275 (2013). In Washburn, it was argued that failure to renew a CR 50 motion after the jury's verdict precluded review on appeal. Id. at 549. The Supreme Court explicitly held that renewal after return of the verdict is not required and departed from analogous federal law in favor Washington's own law applicable to CR 50. Id. at 749-50.

H. The Appellate Court Is Entitled to Review the Failure of the Trial Court to Grant Summary Judgment Where the Issue is Purely Legal.

Generally, a subsequent trial bars review of a denial of a summary judgment motion because the trial resolves material issues of fact. Kaplan v. NW Mut. Life Ins. Co., 115 Wn.App. 791, 65 P.3d 16 (2003). However, this rule is subject to a limited exception where summary judgment turns solely on an issue of substantive law rather than factual matters. Univ. Village Ltd. Partners v. King County, 106 Wn.App. 321,

324, 23 P.3d 1090 (2001). Here, the Appellate Court is entitled to review the summary judgment motion, which presented purely legal issues. In particular, the legal issues set forth as to whether a party must show that a plaintiff who alleges they are the victim of a perceived disability must establish that the condition they are perceived to suffer from qualifies as a disability as argued *supra*.


III. CONCLUSION

Clipse's claims of discrimination should be dismissed due to the lack of evidence as to at least one, and in many cases several, element. Clipse's promissory estoppel claim also requires dismissal due to the uncontroverted testimony establishing that their claim is predicated on an at-will relationship and no guarantees or promises were made to Clipse which are sufficiently concrete to support a claim for promissory estoppel.

DATED this 10th day of December, 2014

MCGAVICK GRAVES, P.S.

By:


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DECLARATION OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served via ABC Legal Messengers for delivery by December 11, 2014, a copy of the Amended Reply Brief of Cross-Appellants Per Court Order of December 8, 2014 to:

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Signed at Tacoma, Washington this 10th day of December, 2014.

McGAVICK GRAVES, P.S.

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